KAMARUDIN MERICAN NOORDIN A

v.

KAKA SINGH DHALIWAL

HIGH COURT MALAYA, KUALA LUMPUR B
LEE SWEE SENG JC
[CIVIL SUIT NO: S-22-471-2006]
26 OCTOBER 2010

CIVIL PROCEDURE: *Representative action - Requirements - Whether satisfied - Whether all members must be peculiarly and personally affected as a whole - Whether plaintiff had capacity to bring action - Rules of the High Court 1980, O. 15 r. 12* C

CONSTITUTIONAL LAW: *Equality - Federal Constitution, art. 8 - Relationship between licensed race horse trainers and Malayan Racing Association (MRA) - Whether unilateral amendment of Rules of Racing by MRA amounted to breach of equality provisions - Rules to be applied uniformly to all persons under like circumstances or in same class* D

CONTRACT: *Breach - Amendment of rules by society - Whether amounted to breach - Contractual relationship between licensed race horse trainers licensed and Malayan Racing Association (MRA) - Amendment by MRA to r. 230 of the MRA Rules of Racing - Whether unilateral amendment of rules amounted to breach of contract* E

F

CONTRACT: *Restraint of trade - Malayan Racing Association (MRA) amending r. 230 of the MRA Rules of Racing to provide for a minimum number of horses to be trained by licensed race horse trainers - Whether r. 230 amounted to restraint of trade - Difference between a contract restrictive of trade and a contract in restraint of trade - Contracts Act 1950, s. 28* G

The plaintiff was a Race Horse trainer licensed by the Malayan Racing Association (MRA). He was also the President of the Association of West Malaysian Race Horse Trainers (AWMRT). The defendant was the Secretary of the MRA. The MRA is empowered to regulate the profession and sport of horse racing in Malaysia and Singapore which is governed by the Rules of Racing, the MRA Regulations and the notices to the MRA (collectively called the MRA Rules). Rule 230 of the MRA Rules ("Rules 230") was recently amended to read: "No trainer shall train, have charge of or have in his stable or at his spelling station H I

less than an average of twenty (20) horses a month over a period of one year." The plaintiff in this action claimed for the following reliefs: (i) a declaration that the amended r. 230 was *ultra vires*, null and void and unenforceable under the law; and (ii) an order that the defendant and/or the MRA be restrained from enforcing or trying to enforce r. 230 against the plaintiff or any members of the AWMRT. The parties agreed to resolve the matter by way of O. 14A of the Rules of the High Court 1980 (RHC). The following issues were raised: (i) whether the action was properly constituted as a representative action under O. 15 r. 12 RHC. The defendant's counsel submitted that the three requirements of O. 15 r. 12 RHC had not been satisfied for this representative action to have been properly brought as not all members of the AWMRT had a common grievance. Only about five of them would be immediately affected by r. 230; (ii) whether the plaintiff had a cause of action against the defendant in his personal capacity; (iii) whether the relationship between the plaintiff and the MRA was founded on contract and that the rights and obligations between the parties *inter se* are purely contractual; (iv) Whether MRA was in breach of contract by amending and enforcing the MRA Rule of Racing 230 against the plaintiff; (v) whether the plaintiff could rely upon the public law remedies of legitimate expectation and public policy; or whether the only remedies available to the plaintiff were private law remedies; (vi) whether r. 230 was a restraint of trade within the meaning of s. 28 of the Contracts Act 1950 and/or contravened art. 5 of the Federal Constitution; (vii) whether r. 230 contravened art. 8 of the Federal Constitution and/or whether the scope of art. 8 extends to private rights based on contract. The plaintiff contended that r. 230 violated art. 8 for discriminating against trainers with less than an average of 20 horses in their stable a month; (viii) whether r. 230 was enforceable in view of reg. 37 of the MRA which does not require the plaintiff to have a minimum of 20 horses when an application is made for a horse trainer's license.

Held (dismissing the prayer for the declaration and injunction):

(1) All the members need not be peculiarly and personally affected as a whole before a representative action can be brought. So long as all members are potentially and prospectively affected though presently only some are peculiarly and personally affected would still be sufficient justification to activate a

representative action. Surely life as a Trainer would not be the same again after the amended r. 230 came into force; a trainer has to keep an eye on the number of horses he has in the stable and station and to keep sufficient records to be able to do an average calculation such that even if the number of horses hovers above and below 20, he must ensure that averagely he has at least 20 horses for training per month over a period of a year. The representative action was properly constituted within the meaning of O. 15 r. 12 RHC. (para 13)

(2) The plaintiff had a cause of action against the defendant because he too was a person affected by the new r. 230. He now could not allow the average number of horses he trained to be fewer than 20 horses per month. This was something that he need not have to bother before. The plaintiff was adversely affected and prejudiced by r. 230. His loss of license as a race horse trainer need not be immediate or imminent so long as it was inevitable if the requirement of r. 230 was not met. (para 19)

(3) The relationship between the plaintiff and the MRA was founded on contract. There was no breach of contract on the part of the MRA in amending and enforcing r. 230 against the plaintiff. (paras 22 & 26)

(4) Concepts of unconscionability, reasonableness and fairness are universal concepts of law that pervade the whole *corpus juris* as may be applied to every sphere and spectrum of human endeavour. More so when a private contractual relationship has a public element infused into it as in this case of the livelihood of race horse training. (para 49)

(5) Whilst every clause that restricts in some ways the practice of a certain profession or trade is in the direct sense restrictive, that by itself does not make the contract a restraint of trade contract. There is a difference between a contract restrictive of trade and a contract in restraint of trade. There was no sufficient evidence for a finding that r. 230 was caught under the prohibition of s. 28 of the Contracts Act 1950. The rationale for r. 230 as was stated by the defendant was to promote professionalism and to help trainers hone their skills. Every profession is entitled to set certain parameters within which its members must carry out the calling of the profession. (paras 51 & 52)

(6) Article 8 does not provide that the rules have to be applied uniformly to all persons in all circumstances everywhere but that the rules have to be applied uniformly to all persons under like circumstances or in the same class. Rule 230 applied to all trainers. (para 55)

(7) There was nothing in the MRA Rules and the application form for a professional trainer license which stated that the MRA reg. 37 is the only set of criteria to be fulfilled before a trainer can be granted a professional trainer license. (paras 66 & 67)

Case(s) referred to:

Abdul Ghani Ali & Ors v. PP & Another Appeal [2001] 3 CLJ 769 FC ***(refd)***

Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor [2005] 2 CLJ 713 FC ***(refd)***

Buckley v. Tutty [1971] MLB (Aus) 69 ***(refd)***

Ferd Dawson Calvin v. John Henry Brownlow Carr And Others [1979] 2 WLR 755 ***(refd)***

Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12 ***(refd)***

Law v. National Greyhound Racing Club Ltd [1983] 3 All ER 300 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Nagle v. Feilden [1966] 1 All ER 689 ***(refd)***

Ng Kim Chor v. HR Hochstadt & Ors [1998] 1 LNS 337 HC ***(refd)***

Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors [1986] 1 LNS 124 HC ***(refd)***

Pharmaceutical Society of Great Britain v. Dickson [1968] 2 All ER 686 ***(refd)***

Polygram Records Sdn Bhd v. Hillary Ang & Ors & Anor [1994] 3 CLJ 806 HC ***(refd)***

R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan [1993] 2 All ER 853 ***(refd)***

Re Tong Tai Holdings Sdn Bhd [2003] 6 CLJ 170 HC ***(refd)***

Saad Marwi v. Chan Hwan Hua & Anor [2001] 3 CLJ 98 CA ***(refd)***

Shayne Corey Cahill v. Kaka Singh Dhaliwal [2005] 2 CLJ 147 HC ***(refd)***

Smith And Others v. Cardiff Corporation [1954] 1 QB 210 ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Woon Kwok Cheng v. HR Hochstadt & Ors [1997] 4 CLJ 106 HC ***(refd)***

Woon Kwok Cheng v. Tan Sri Datuk Chang Min Tat & Ors [1994] 2 AMR 27 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 28
Federal Constitution, arts. 5, 8
Rules of the High Court 1980, O. 14A, O. 15 r. 12
Societies Act 1966, s. 9(c)

For the plaintiff - Chin Hein Choong; M/s KH Wong, Chin & Cheah
For the defendant - Jason Lai; M/s Shearn Delamore & Co

Reported by Amutha Suppayah

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] Many of us are foreign to the whole business of horse racing, let alone horse training and all that it entails. It is a field of human endeavour, a profession, a sports, a past-time that has its own set of rules, circle of friends and indeed its own vocabulary and nomenclature. The word 'spelling station' has nothing to do with spelling-bee but is a stable for a horse to recuperate so that it can be revived and rejuvenated. Fancy being confronted with the recently amended r. 230 of the Rules of Racing of the Malaysian Racing Association (MRA) that reads:

> No trainer shall train, have charge of or have in his stable or at his spelling station less than an average of twenty (20) horses a month over a period of one year.

[2] The validity and enforceability of this r. 230 is the subject matter of this case.

Parties

[3] The plaintiff is a Race Horse trainer licensed by the Malayan Racing Association (MRA). He is also the President of the Association of West Malaysian Race Horse Trainers (AWMRT).

[4] The defendant is the secretary and the registered public officer of the MRA and sued pursuant to s. 9(c) of the Societies Act 1966. His name has appeared in many a reported case involving the MRA and his cases have adorned the pages of our law journals.

[5] The MRA is a private and domestic body empowered to regulate the profession and sport of horse racing in Malaysia and Singapore. The current membership of MRA consists of the Penang Turf Club, the Perak Turf Club, the Selangor Turf Club and the Singapore Turf Club.

[6] The profession and the sport of horse racing in Malaysia and Singapore are Rules of Racing, the MRA Regulations and the Notices to the MRA (collectively called the MRA Rules).

[7] The MRA Rules govern *inter alia* the rights and liabilities of all the parties involved in the profession and the sport of horse racing like the jockeys, trainers, horse owners and others.

Prayer

[8] The plaintiff in this writ action is claiming for the following reliefs against the defendant:

(a) A declaration that r. 230 of the Rules of Racing that has been amended by the MRA and effective from 1 January 2006 is *ultra vires*, null and void and unenforceable under the law;

(b) An order that the defendant and/or the MRA be restrained from enforcing or trying to enforce r. 230 of the Rules of Racing against the plaintiff or any members of the AWMRT.

Principles

[9] At the last case management date the court asked if this is a matter that could be resolved by way of the O. 14A procedure of the Rules of the High Court 1980 (RHC). Parties were most amenable to that and had formulated the following questions of law for determination which determination will effectively resolve the issues before this court brought by the plaintiff in this action.

Whether The Action Herein Is Properly Constituted As A Representative Action Under O. 15 r. 12 RHC

[10] Plaintiff's counsel Chin Hein Choong submitted that the action herein is properly constituted as a representative action. The plaintiff is a trainer licensed by the MRA and so are all the members of the AWMRT. The reliefs claimed by the plaintiff and the persons he represents have a common interests. That, it would appear, satisfy the requirements of O. 15 r. 12 RHC. He further argued that even assuming for a moment that only a few

trainers are affected by r. 230 as amended, this is immaterial as the amendment should not have been effected in the first place in breach of the plaintiff's original contractual terms with the defendant when he first became a trainer.

[11] The defendant's counsel Jason Lai submitted that the three requirements of O. 15 r. 12 RHC have not been satisfied for this representative action to have been properly brought:

(a) That the plaintiff and those represented by him are members of a class and have a common interest;

(b) That the plaintiff and those it represents have a common grievance; and

(c) That the relief sought is in its nature beneficial to them all.

[12] He argued that as not all members of the AWMRT have a common grievance as only about five would be immediately affected by r. 230. Moreover, the nature of the relief sought by the plaintiff could not be said to be beneficial to all members of the AWMRT, merely because potentially, and only potentially, some members of the AWMRT may be affected by r. 230 at some future point in time.

[13] This court would look at this action from the perspective of a President championing the rights of its members in a common solidarity with its members even though not all may be affected immediately by r. 230. The whole purpose of coming together to form an association is that there is a recognition that there is strength in numbers and there is that camaraderie in caring for one another's interest and championing the member's causes and concerns. I see that some members of AWMRT are presently affected and all might be to some extent potentially and prospectively affected by r. 230. All the members need not be peculiarly and personally affected as a whole before a representative action can be brought. So long as all members are potentially and prospectively affected though presently only some are peculiarly and personally affected would still be sufficient justification to activate this provision of a representative action. Surely life as a Trainer would not be the same again after the amended r. 230 comes into force; a trainer has to keep an eye on the number of horses he has in the stable and station and to

keep sufficient records to be able to do an average calculation such that even if the number of horses hovers above and below 20, he must ensure that averagely he has at least 20 horses for training per month over a period of a year!

[14] Mr Jason for the defendant referred me to the following cases:

Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors [1986] 1 LNS 124;

Re Tong Tai Holdings Sdn Bhd [2003] 6 CLJ 170;

Smith And Others v. Cardiff Corporation [1954] 1 QB 210;

Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12.

[15] All that the cases are saying is that one must not be a busy body, troubling the court perfunctorily over the petty; not purposefully or predominantly or prominently over a cause that has a public element to it or at least affecting the common interests of members, suffering a common grievance and seeking a common beneficial relief. There surely must be a place for the public-spirited to pursue the cause of those too weak and scattered and scared to speak out for their rights and interests and to seek the relevant remedies. Where it is the public officer of a society that brings a representative action, one can assume that he would have obtained the consent and mandate of its members in bringing the action, be it only a single member is affected. In any event the defendant is not suggesting that he does not have such a mandate or consent. Rules of procedure are not designed to suffocate or stifle litigation over a genuine grievance but to facilitate it. Otherwise disgruntled members may be tempted to take the law into their own hands and do what seems right in their own eyes. The result would be chaos. The courts' doors are always open to all who would knock on it and seek entrance to address a legal issue that may affect it be it just one member of the public or a collection of people. In devising and developing rules on representative action and *locus standi* courts are careful not to find itself strangled by rules of its own making. Courts are careful not to put too many hurdles in the path of a litigant who wants to sincerely and seriously pursue and prosecute a genuine grievance. Basic to all these rules must be the question in the

fore-front of our mind: Is a person prevented from coming to court to seek a genuine legal redress either on his own behalf alone or together with a broader cross-section of the public?

[16] Little wonder that the cases on *locus standi* have chiefly evolved from cases in public interest litigation and perhaps this will be a growing field of law with concerns over access to fresh air, clean water, reasonably affordable electricity and energy supply and the like.

[17] I therefore find that this action has been properly constituted as a representative action within the meaning of O. 15 r. 12 RHC.

Whether The Plaintiff Has A Cause Of Action Against The Defendant In His Personal Capacity

[18] The plaintiff states that he is a Race Horse Trainer himself and licensed by the MRA. The MRA is the sole body empowered to issue a Race Horse Trainer's license. If he does not have a license he cannot be a Race Horse Trainer and cannot even enter the Turf Club for his horse training activity. He cannot earn his living as a Race Horse Trainer if he does not have a license. He has been having his license for around 40 years. When he first obtained it in the 1970s, r. 230 was non-existent. The plaintiff is required to renew his license every year. It is mandatory for him to submit his application form every year. No application submitted to MRA, no license-as simple as that!

[19] Does he have a cause of action against the defendant? Very much so because he too is a person affected by the new r. 230. He now cannot allow the number of horses he trains to be fewer than 20 horses or at least averagely he should have not fewer than 20 horses per month over a period of a year. This is something that he need not have to bother before and as such could not care less before. He is affected if not presently, then prospectively, potentially and predictably along the passage of time and at any particular point in time he has to pay attention to the numbers; lest he be disqualified from being a Race Horse Trainer.

[20] To use the test of a 'cause of action' in *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12, it is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Applying that test I think one

A can safely say that the plaintiff has been adversely affected and prejudiced by r. 230. His loss of license as a Race Horse Trainer need not be immediate or imminent so long as it is inevitable if the requirement of r. 230 is not met, would be sufficient.

B **[21]** I thus find that the plaintiff in any event has a cause of action against the defendant in his personal capacity.

Whether The Relationship Between The Plaintiff And The MRA Is Founded On Contract And That The Rights And Obligations Between The Parties Inter Se Are Purely Contractual

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[22] Both parties seem to agree that the relationship is one founded on contract. This is borne out by the cases that have been decided before such as:

D *Woon Kwok Cheng v. Tan Sri Datuk Chang Min Tat & Ors* [1994] 2 AMR 27 at p. 1380;

> MRA is a private and domestic body and the rights and obligations of the appellant *vis-à-vis* MRA are purely contractual and as such the appellant can only rely on
E private law remedies.

[23] *Ng Kim Chor v. HR Hochstadt & Ors* [1998] 1 LNS 337; [1998] 7 MLJ 19 at p. 22:

> It is not in dispute that the MRA is a private and domestic body,
F and the powers which the MRA exercises over those who like the plaintiff by reason of being a jockey licensed by the MRA, agreed to be bound by the Rules of Racing derived from the agreements of the parties which give rise to private rights based on the contract and that the only remedies available to the applicant are
G private law remedies, and not a matter for judicial review. **The relationship between the plaintiff and the MRA is founded on contract, and the Rules of Racing and the regulations are the terms of the contract**.
>
> (emphasis added)

H

[24] *Shayne Corey Cahill v. Kaka Singh Dhaliwal* [2005] 2 CLJ 147 at pp. 151 & 155:

> The rational for this proposition is based on the principle that these private or domestic tribunals derive their authority from the
I contract entered into between the parties in dispute. … As the plaintiff and the Selangor Turf Club have agreed to abide by the

rules set out in the MRA Racing Rules, which forms part of their contract, any breach of such rules, including that involving natural justice, is a breach of the contract.

[25] The Privy Council case of *Ferd Dawson Calvin v. John Henry Brownlow Carr And Others* [1979] 2 WLR 755 at p. 762 on the Australian Rules of Racing was also referred to and in particular to the passage that reads:

> Although these rules and statutory provisions contain a good deal of repetition and circularity it is clear that they provide a comprehensive scheme or code for the administration of racing and for the exercise of discipline through domestic bodies whose jurisdiction, though reinforced by statute, is **founded on consensual acceptance** by those engaged in the various activities connected with horse racing. (emphasis added)

[26] I am more than satisfied that the relationship between the plaintiff and the MRA is founded on contract and that the rights and obligations between the parties *inter se* are purely contractual as agreed to by both the parties and attested by the authorities alluded to.

Whether There Was A Breach Of Contract On The Part Of The Mra In Amending And Enforcing The MRA Rule Of Racing 230 Against The Plaintiff

[27] Flowing from the answer to Question 3 the obvious and necessary question would be whether there was a breach of contract on the part of MRA in amending and enforcing r. 230 against the plaintiff. As if to reinforce the point that contractually the plaintiff and all Race Horse Trainers have agreed to abide by the MRA Rules as may be amended from time to time, the plaintiff and all Race Horse Trainers have to sign annually an 'Application Form for a Professional Trainer License' which has a term that reads as follows:

> That I will be bound by, subject in all respects to, and shall comply with the Constitution, Rules of Racing, Regulations and Notices of the MRA, as may **from time to time be amended and added to**. I further agree to accept as final any decisions made in accordance with the Rules of Racing by the Committee of the MRA, or the Committee of any Associated or Affiliated clubs, or their duly appointed Stewards. (emphasis added)

[28] The plaintiff's counsel argued that there was a breach of contract by MRA in that the amendment was made unilaterally. If the plaintiff does not sign the application form containing that objectionable clause he would not be issued a license. I think it is not a case of he having no choice. He could still have a choice in not being a Race Horse Trainer. It is a case of someone having a monopolistic control over the profession of Race Horse Trainers. MRA is saying that if you want to be a Race Horse Trainer you follow our conditions and rules including those that may be amended from time to time. If you are not happy, you don't have to be a Race Horse Trainer. So the Race Horse Trainer has an Hobsos choice-take it or leave it. It is an unhappy state of affairs. Contractually is the MRA at fault or in breach of their obligations? Must the MRA consult with the plaintiff and the members he represent and perhaps even get their consent before amending r. 230?

[29] The defendant submitted that the plaintiff, and all other parties involved in the profession and sport of horse racing for that matter, have no doubt entered into such agreement with the MRA with the understanding that the MRA requires such power and authority (as derived from the agreement) to effectively discharge its duty and function to regulate the profession and sport of horse racing in Malaysia and Singapore. Sir Thomas Bingham MR in the case of *R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853 at p. 857-858 observed:

> The powers which the Jockey Club exercised in the present case (to order the taking of samples, to fine and to disqualify) are among those assumed by the Jockey Club to safeguard the integrity of British racing. Under its Rules of Racing, the finding of prohibited substance obliges the Jockey Club to fine the trainer (unless the administration of the substance is shown to be accidental) and to disqualify the horse for the race in question. The application has not criticized the stringency of the rules. There is no ground for doing so. For a variety of reasons, including the large sums of money which stand to be won or lost on the outcome of a single race, horse racing is an activity peculiarly prone to criminality, cheating and chicanery of many kinds. Experience no doubt shows that strong measures of control and close vigilance are necessary pre-conditions of fair and honest competition.

[30] It is not incorrect to say that whilst the plaintiff may now allude that he had no alternative but to agree to provide the MRA with the power to amend the MRA Rules (since it is mandatory for the trainers to sign the "application form for a Professional Trainer Licence" before they can be registered as a licenced trainer), it does not alter the fact that the power and authority which the MRA exercised over the trainers is consensual and contractual.

[31] Counsel for the defendant drew my attention to the English Court of Appeal case of *R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853:

> First, and most importantly, it does so by contracts entered into with racecourse managements, owners, trainers and jockeys. The present case illustrates the routine practice. Thus the application when applying for registration as an owner (and, probably, when entering the filly for the race) and the trainer when seeking renewal of his trainer's licence each agreed to be bound in all respects by the Rules of Racing. (Sir Thomas Bingham MR at page 859 para b)

> I would accept that those who agree to be bound by the Rules of Racing have no effective alternative to doing so if they want to take part in racing in this country. It also seems likely to me that if, instead of Rules of Racing administered by the Jockey Club, there were a statutory code administered by a public body, the rights and obligations conferred and imposed by the code would probably approximate to those conferred and imposed by the Rules of Racing. *But this does not, as it seems to me, alter the fact, however anomalous it may be, that the powers which the Jockey Club exercise over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private rights* on which effective action for a declaration, an injunction and damages can be based without resort to judicial review. (Sir Thomas Bingham MR at page 867 para c-e)

> It is conceded that there is or at all events was a contractual relationship between the Jockey Club and the applicant, both when he applied to be and was accepted as a registered owner and when he entered Aliysa for the Oaks. There was in all probability also a contract between the applicant and those responsible for Epsom racecourse. By entering into those agreements the applicant was expressly submitting to the Rules of Racing and acknowledging that he was governed by the disciplinary powers of the Jockey Club. *Mr. Kentridge has referred to the lack of reality describing such a relationship as consensual. The fact is that if the applicant wished to race his horses in this country he had no choice but*

A *to submit to the Jockey Club's jurisdiction. This may be true but nobody is obliged to race his horses in this country and it does not destroy the element of consensuality*. [Farquharson LJ at page 871 para g-h] (emphasis added)

B **[32]** Jason Lai for the defendant also referred to the English Court of Appeal case *Law v. National Greyhound Racing Club Ltd* [1983] 3 All ER 300:

C Accordingly, in my view, the authority of the stewards to suspend the licence of the Plaintiff derives wholly from a contract between him and the Defendants. I see nothing to suggest that the Defendants have rights or duties relating to members of the public as such. What the defendants do in relation to the control of greyhound racing may affect the public, or a section of it, but the Defendants' powers in relation to the matters with which this case is concerned are contractual. [page 305 para h]

D

[33] Defendant's counsel concluded that the principles stated in the aforesaid English cases of *R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan and Law v. National Greyhound Racing Club Ltd* was accepted by James Foong J (as His Lordship E then was) in *Woon Kwok Cheng v. HR Hochstadt & Ors* [1997] 4 CLJ 106.

[34] Defendant further submitted that in fact, without such power and authority, the MRA would not be able to effectively discharge F its duty and function to regulate the profession and sport of horse racing in Malaysia and Singapore. In any event, the plaintiff had never contended that MRA should not be given strict powers and authority under the MRA Rules to govern and control the activities of the parties involved in the profession and sport of G horse racing. This is particularly in light of the various interests at stake; not least the interests of the betting public on professional horse racing.

[35] Indeed, why parliament does not want to regulate by statute this activity of myriad import is a valid question to which we can H only speculate the answers.

[36] The paradox of having a choice in the context of a consensual and contractual relationship that seems to constrain, constrict and control the freedom to contract within the choice I made is well captured in the following speech in *R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853:

> I understand the criticism made by Mr Kentridge of the reality of the consent to the authority of the Jockey Club. **The invitation to consent is very much on a take it or leave it basis. But I do not consider that this undermines the reality of the consent**. Nearly all sports are subject to a body of rules to which an entrant must subscribe. These are necessary, as already observed, for the control and integrity of the sport concerned. In such a large industry as racing has become, I would suspect that all those actively and honestly engaged in it welcome the control of licensing and discipline exerted by the Jockey Club (Farquharson LJ at page 872 para j-page 873 para a) (emphasis added).

[37] So too, the defendant submitted confidently, the MRA in amending and imposing the MRA Rule of Racing 230 on the plaintiff was merely acting in accordance with the terms of the contract between the plaintiff and the MRA. There is no issue of a breach of contract on the part of the MRA. The MRA did not act outside the terms of the contract (being the terms as found in the "Application Form for a Professional Trainer Licence" and the MRA Rules) to entitle the plaintiff to claim breach of contract.

[38] The harsh reality of this sport and profession is that the plaintiff had already given the power to amend the MRA Rules to the MRA. Of course no one can have more power over us than that which we give them but then again some people because of the inequality of bargaining power *vis-à-vis* the one with power, authority and monopoly can only have a choice that is illusory.

[39] Jason Lai for the defendant also said that the MRA has also from time to time amended the MRA Rules as and when the same is deemed necessary to regulate the profession and sport of horse racing in Malaysia and Singapore. The rhetorical question was asked: If it is deemed a breach of contract on the part of the MRA in amending and enforcing the MRA Rule of Racing 230 against the plaintiff, does that mean that each and every time the MRA amend the MRA Rules the parties have a right to come to court and claim breach of contract? Surely this cannot be right was his answer. In fact, he submitted, it would make a mockery of the MRA being the governing body which regulates and controls the profession and sport of horse racing; not to mention that it would be contrary to the express agreement between the parties.

[40] It is with some reluctance that I find that there was no breach of contract on the part of the MRA in amending and enforcing, the MRA Rule of Racing 230 against the plaintiff. I would have more to say on this in the context of inequality of bargaining power at the end of this judgment.

Whether The Plaintiff Could Rely Upon The Public Law Remedies Of (i) Legitimate Expectation And (ii) Public Policy; Or Whether The Only Remedies Available To The Plaintiff Are Private Law Remedies

[41] The plaintiff while agreeing that the relationship between the plaintiff and the defendant is contractual and consensual, yet that does not prevent the court from applying with innovation and perhaps even some imagination certain principles of public law to do justice to an aggrieved party in a case that warrants it especially in cases of unfair discrimination and unconscionable and unreasonable conduct with constitutional overtone.

[42] Plaintiff's counsel referred me to *Nagle v. Feilden* [1966] 1 All ER 689 an English Court of Appeal's decision which allowed an appeal by a woman trainer who was refused a license to train horses while her head lad had no problem obtaining the license and where the Court of Appeal held that her claim had been wrongly struck out as not disclosing a cause of action. Lord Denning MR at p. 693-694 asked the pertinent question with profound simplicity and logic:

> Now, I quite agree that if we were here considering a social club, it would be necessary for the plaintiff to show a contract. If a man applies to join a social club and is blackballed, he has no cause of action: because the members have made no contract with him. They can do as they like. They can admit or refuse him, as they please; but we are not considering a social club. We are considering an association which exercises a virtual monopoly in an important field of human activity. By refusing or withdrawing a licence, the stewards can put a man out of business. This is a great power. If it is abused, can the courts give redress? That is the question.
>
> It was urged before us that the members of a trading or professional association were like a social club. They had, it was said, an unrestricted power to admit, or refuse to admit, any person whom they choose: and that this was established by a case in 1825 concerning the Inns of Court. In *R v. Lincoln's Inn Benchers* [1825] 4B & C 855 at pp. 859, 860. Bayley, J, said:

> They make their own rules as to the admission of members; and even if they act capriciously upon the subject, this court can give no remedy in such a case; because in fact there has been no violation of a right.

I venture to question this statement, notwithstanding the eminence of the judge from whom it fell. The common law of England has for centuries recognised that a man has right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably that rule is bad. It is against public policy. The courts will not give effect to it. Such was held in the seventeenth century in the celebrated *Ipswich Tailors*' Case [1614], 11 Co Rep 53a. where a rule was made that no person should exercises the trade of a tailor in Ipswich unless he was admitted by them to be a sufficient workman. Lord Coke, CJ, held that the rule was bad, because it was "against the liberty and freedom of the subject". If, however, the rule is reasonable, the courts will not interfere. In the eighteenth century, the company of surgeon required as a qualification for an apprentice an understanding to the Latin tongue. The governors rejected an apprentice because on examination they found him to be totally ignorant of Latin. Lord Mansfield, CJ, declined to interfere with their decision (see *R v. Surgeons' Co (Master)* [1759], 2 Burr 892).

There are not many modern cases on the subject, but they support the principle which I stated. In *Weinberger v. Inglis* [1919] AC 606 the rules of the Stock Exchange gave to the committee an absolute discretion to admit such persons as they "shall think proper". The House of Lords were not referred to the old cases but to the cases where directors are empowered in their discretion to refuse a transfer shares, such as *Re Gresham Life Assurance Society, Ex p. Penny* [1861-73] All ER Rep 903; [1872] 8 Ch App 446. The House were disposed to accept this analogy and to hold that, if the committee of the Stock Exchange were to act arbitrarily or capriciously, the courts could set aside their decision- see what Lord Buckmaster [1919] AC at p. 621, Lord Atkinson [1919] AC at p. 631 and Lord Wrenbury [1919] AC at p. 644 said. Then again in *Faramus v. Film Artistes' Association* [1964] 1 All ER 25; [1964] AC 925, a trade union, which kept a "closed shop", made a rule forbidding entry to any person who had been convicted of a criminal offence. Lord Pearce said [1964] 1 All ER at p. 32; [1964] AC at p. 946:

> Since the respondent union have a monopoly, exclusion from membership prevents a man from earning his living in this particular profession. An absolute rule that so prevents any person who may have suffered a trivial conviction many years before is in restraint of trade and unreasonable.
>
> We cannot, of course, decide that matter today. All I say is that there is sufficient foundation for the principle for the case to go to trial. We live in days when many trading or professional associations operate "closed shops". No person can work at his trade or profession except by their permission. *They can deprive him of his livelihood. When a man is wrongly rejected or ousted by one of these associations, has he no remedy? I think that he may well have, even thought he can show no contract. The courts have power to grant him a declaration that his rejection and ouster was invalid and an injunction requiring the association to rectify their error. He may not be able to get damages unless he can show a contract or tort; but he may get a declaration and injunction*. Thus in *Abbott v. Sullivan* [1952] 1 All ER 226; [1952] 1 KB 189 the corn porter (although he had no contract with the committee) obtained a declaration that he was entitled to be reinstated on the register: and this court would, I think, have granted an injunction but for the fact that he had already been reinstated before the judgment. In *Davis v. Carew-Pole* [1956] 2 All ER 524 the livery-stablekeeper (although he was not a member) obtained a declaration that the decision of the stewards disqualifying him was void and an injunction restraining them from treating him as a disqualified person. I know that in the later case of *Byrne v. Kinematograph Rentals Society, Ltd* [1958] 2 All ER 579 at p. 596, Harman, J, thought that those two cases could be based on contract. But I think that could only be done by inventing a fictitious contract. All through the centuries courts have given themselves jurisdiction by means of fictions; but we are mature enough, I hope, to do away with them. The true ground of jurisdiction in all these cases is man's right to work. I have said before, and I repeat it now, that a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the courts will intervene to protect his rights of property, so they will also intervene to protect his right to work. (emphasis added)

[43] Mr HC Chin for the plaintiff also referred my attention to the House of Lords case of *Pharmaceutical Society of Great Britain v. Dickson* [1968] 2 All ER 686 which held that the respondent as a member of a society was entitled to test in the courts the validity of a proposed rule of professional conduct and for an

injunction and a declaration that the proposed rule went outside the express object of the society. It was also held that the restrictions were a restraint of trade and contrary to public policy. Lord Reid said in that case that "... it appears to me that if a member of a profession can show that a particular restriction on his activities goes beyond anything which can be reasonably related to the maintenance of professional honour or standards, the Court must be able to intervene ..."

[44] Mr HC Chin in his research had also shared with the court the case of *Buckley v. Tutty* [1971] MLB (Aus) 69.

[45] Whilst English judges have to depend on some common law right with respect to the right to work *vis-à-vis* a contractual relationship, we in Malaysia have a written constitution and I can do no better that to quote his Lordship Gopal Sri Ram JCA (as he then was) in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 at p. 801:

> The first of these is *Olga Tellis v. Bombay Municipal Corporation* AIR [1986] SC 180, 193, where Chandrachud CJ said:
>
> > For purposes of argument, we will assume the factual correctness of the premise if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 [the equivalent of our Article 5(1)] is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. *An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live.* And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the

A right to life. *That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.* (Emphasis added.)

B **[46]** Even in the sphere of public life, the landscape is fast changing and the trend is to veer away from or at least not to perpetuate an unfair monopolistic position with the introduction of the Competition Act 2010 which was gazetted on 10 June 2010 though not enforced yet. The trend is towards transparency and C accountability and the public-private divide is increasingly blurred and rightly so when increasingly big corporation can dictate, direct and dominate the way we conduct our lives and carry out our affairs.

D **[47]** Mr Jason Lai for the defendant had referred the court's attention to *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65. 'Legitimate expectation' is what the words suggest: an expectation that one can legitimately look forward to' and though E as a concept it started in the realm of public law it has an equivalent though reverse concept in private law as in the concept of estoppel where a party because of his action or inaction in a contractual relationship context is stopped from raising certain defences for instance.

F **[48]** I think the public-private law dichotomy can be a little artificial as concepts of unconscionability, reasonableness and fairness are universal concepts of law that pervade the whole corpus juris as may be applied to every sphere and spectrum of G human endeavour and experience. More so when a private contractual relationship has a public element infused into it as in this case of the livelihood of Race Horse Training and all that it entails with big money changing hands.

H **[49]** I would answer the question raised in the affirmative.

Whether The MRA Rule Of Racing 230 Is A Restraint Of Trade Within The Meaning Of s. 28 Of The Contracts Act 1950 And/Or Contravenes art. 5 Of The Federal Constitution

I **[50]** Whilst every clause that restricts in some ways the practice of a certain profession or trade is in the direct sense restrictive, that by itself does not make the contract a restraint of trade

contract. There is a difference between a contract restrictive of trade and a contract in restrain of trade as pointed out so clearly by his Lordship Visu Sinnadurai J in *Polygram Records Sdn Bhd v. Hillary Ang & Ors & Anor* [1994] 3 CLJ 806. There is no sufficient evidence before this court for a finding that this particular r. 230 is caught under the prohibition of s. 28 of the Contracts Act 1950. The rationale for this r. 230 as was stated by the defendant is to promote professionalism and to help trainers hone their skills. Of course to every argument on benefits of doing more of the same thing there is the counter argument of doing a lot of the one thing: one Race Horse Trainer just want to train one horse a year or before the amendment, only 15 horses at any one time. It is a policy decision of MRA and it may well turn out to be a bad policy. However that is for MRA to suffer the consequences and perhaps to eat humble pie and then say 'we shall suspend the operation of r. 230.'

[51] I think every profession is entitled to set certain parameters within which its members must carry out the noble calling of the profession. It is not for this court to say, at least not at this stage that 15 horses was all right but that 20 horses at any one time a month averagely over a period of one year is five too many! Unhappiness there may be but this court is not prepared to strike the r. 230 down as being a clause in restraint of trade. In any event each trainer is a kind of independent contractor and he is not prohibited from working as a trainer in another jurisdiction that may not have this restriction. I gather that this sort of skills is trans-jurisdictional but of course they will be adjustments to make. This is more a problem arising out of a monopolistic position given to MRA whether by default or design and until parliament intervenes to control it, the most one can do is to argue that contractual as the relationship is, it does not mean that in every case it will not be susceptible to the application of public law remedies or public policy considerations or otherwise subject to constitutional safeguards.

[52] Similarly whilst I endorse the sentiments expressed in *Tan Tek Seng (supra)* as the harbinger of a more robust development in constitutional protection of the workers, I cannot at this stage say that r. 230 has to be struck down for being unconstitutional. Restrictive I would agree but not necessarily a restraint of trade or for that matter repressive of the right to life constitutional safeguard of art. 5.

[53] I would thus answer question 6 in the negative.

Whether The MRA Rule Of Racing 230 Contravenes art. 8 Of The Federal Constitution And/Or Whether The Scope Of art. 8 Of The Federal Constitution Extend To Private Rights Based On Contract

[54] The plaintiff contended that r. 230 violates art. 8 of the Federal Constitution in that there is now a purported discrimination against trainers with less than an average of 20 horses in their stable a month. With respect to the plaintiff's submission, I agree with the defendant that art. 8 does not provide that the rules have to be applied uniformly to all persons in all circumstances everywhere but that the rules have to be applied uniformly to all persons under like circumstances or in the same class. I agree with the defendant that r. 230 applies to all trainers and for purposes of illustration, if r. 230 operates against male trainers and not female trainers then that would be in breach of art. 8.

[55] In support of this proposition, Mt Jason Lai referred me to the following:

Abdul Ghani Ali & Ors v. PP & Another Appeal [2001] 3 CLJ 769;

Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor [2005] 2 CLJ 713.

[56] The plaintiff's counsel sought to enlighten the court by drawing its attention to the fact that the Macau Jockey Club, Hong Kong Jockey Club and Korea Jockey Club all have a similar rule stating that a trainer must have a minimum number of horses in their stables but one important underlying factor in those clubs are that the individual trainers are paid the training fees and disbursements incurred for keeping those horses in the stables by the respective clubs and they do not need to collect payment from the individual owners. Here in Malaysia, it seems, we have a situation where the trainers are forced to have on average not less than 20 horses a month in their stables but yet they are individually responsible to collect training fees and disbursements from the respective owners. The plaintiff asked the question what happens then if the owners do not regularly pay the training fees and disbursements? I suppose that is where the lawyers come in and sue for breach of contract.

[57] The plaintiff also asked the question: Would it not be absurd that in order for the trainer to comply with the amended r. 230, the trainer himself has to fork out the money just to keep the horse in his stables?

[58] Persuasive as that argument is from the merits perspective, that argument has no relation to an art. 8 violation. The plaintiff has a specialised skill and together with the members of the AWMRT they can find strength, solace and solidarity in numbers. They can lobby for change and in extreme cases they can even boycott the training of Race Horses. To say that there has been a violation of art. 8 would be too far-fetched.

[59] As to whether art. 8 extends to private rights based on contract, that would depend on the facts and circumstances of each individual case and in the present case I do not see how art. 8 can be brought to bear on the parties' contractual rights and obligations.

[60] The story was once told of a master that had hired some workers to work in his field for a negotiated wage. They started work in the early morning and when it was past noon the master extended the invitation to others to work. The others came and work without negotiating their wage. At the end of the day the master paid everyone the same and so the ones who worked from early morning said the master was not fair. The master replied that if he had chosen to be generous, who are the workers who had worked from morning to complain? They negotiated for a wage and they got what they wanted. The rest who came later did not negotiate their wage and yet the master chose to be generous. I supposed if one were to apply art. 8 one can still say that it is different classes of workers that we can distinguish and that room can be given for trust and generosity.

[61] Question 7 is thus answered in the negative.

Whether This Honourable Court Ought To Step Into The Shoes Of The MRA To Regulate And Govern The Profession And Sport Of Horse Racing In Malaysia And Singapore

[62] The court does not see the relevance of this question with respect to the disposal of the prayers prayed for in this application. The expression 'step into the shoes' is a figurative one and subject to differing interpretations as to what it actually means.

Does it mean that the parties want this court to be a regulator of some kind and that this court should take over the job of the MRA and to regulate the Horse Racing and Race Horse Training profession? The answer must be a resounding and reverberating "No"! The courts have far more important things to do and in any event the courts does not exist under the Federal Constitution and the Courts of Judicature Act 1964 for that purpose.

[63] That was the reason for the court to decline to answer the question posed. In any event if a different intention was meant from the question formulated, I think the answers to the other questions posed would be more than sufficient for this court to dispose of the issues raised in this case.

This Question Has Been Withdrawn By Mutual Consent

Whether r. 230 Is Enforceable In View Of reg. 37 Of The MRA

[64] The argument by the plaintiff goes like this:

> Under Regulation 37.2 of the MRA Regulations, the requirements as set out by the MRA do not require the Plaintiff to have a minimum of 20 horses when an application is made for a horse trainer's license. There is thus clearly a conflict if Rule 230 is read together with Regulation 37.2. On one hand, when a fresh application for a Trainer's license is made, the MRA's criteria for issuing a new license is governed by Regulation 37.2 but when a Trainer is granted his license, then Rule 230 states that he shall not have on an average less than 20 horses in his stables. It would then mean that a Trainer who meets the criteria for the issuance of a fresh license under Regulation 37.2 would immediately fall foul of Rule 230. It is thus unacceptable to have such a conflicting set of rules.

[65] I agree with the defendant's argument that there is nothing in the MRA Rules and the application form for a Professional Trainer License which states that the MRA reg. 37 is the only set of criteria to be fulfilled before a trainer can be granted a Professional Trainer License. MRA reg. 37.2.10 actually provides as follows:

> Notwithstanding that the licensing criteria set out in this Regulation 37.2 is intended to be adhered to as closely as possible, the MRA Committee may at its sole discretion waive or vary certain criteria depending on the facts of each application for a license.

[66] The defendant contended that the MRA retains the right, which right is expressly given to the MRA by the trainers, to impose any additional criteria as the MRA deems necessary. The r. 230 is one such additional criteria.

[67] I find that the two regulations are not in conflict with each other and can be read, applied and enforced harmoniously with each other.

Pronouncement

[68] In the light of the questions having being answered in the manner above, I am constrained to dismiss the prayer for the declaration and injunction. The court is however troubled by this situation of an inequality of bargaining powers which no one can deny. In the circumstance, justice would have been done if there is an appeal mechanism for a trainer adversely affected by r. 230. I must say with all the emphasis I can command that this court is not trying to substitute its decision for the decision of the MRA in the area of issuing of license to Race Horse Trainers like the plaintiff and members of the AWMRT. Neither is this court trying to rewrite the contract in the MRA Rules. The ends of justice would have been more than served if there is a provision inserted in the Rules to this effect and the court so direct:

> No Trainer shall have his license revoked, terminated or not renewed until and unless he has been given the opportunity to respond to a proposed decision to revoke, terminate or not renew his license by giving grounds of extenuating circumstances and that a period of 3 calendar months be given to the Trainer to fulfil the condition in Rule 230 in the event that the MRA should find the circumstances advanced by the trainer as being not extenuating enough.

or words to the like effect.

[69] The final decision is still with the MRA but if it were to be asked whether there should be an expectation that there should be such an appeal procedure, using the implied term test for contract, the silent bystander would say, "Surely that is to be expected as part of the procedure". It is something so basic that it goes without saying it. If said, it would be met with the immediate refrain, 'Of course, that is to be expected.'

[70] If the above approach is rather unorthodox I must then draw some inspiration from the Court of Appeal in *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98 where at p. 114 his Lordship Gopal Sri Ram JCA (as he then was) said:

> In my judgment, the time has arrived when we should recognise the wider doctrine of inequality of bargaining power.

and at p. 115:

> What is therefore called for is a fairly flexible approach aimed at doing justice according to the particular facts of the case. Historically, that is what equity is all about. This brings me to the third alternative. This is to adopt the English doctrine but apply it in a broad and liberal way as in Canada. I find this the most just solution. It is a method by which practical justice may be achieved within a framework of principles.

[71] As this case has the public element infused into a seeming contractual dispute and as it has some public interest rather than mere contractual rights in dispute, I have made no order as to costs.

Postscript

[72] I must commend both counsel for their industry and effort in the preparation of this case and the warmth and cordiality they have extended to each other. I have at a few places referred to the number of horses as 'not less than 20' following the words used in r. 230 but perhaps it should be 'not fewer than 20' as one is still able to count up to 20 at least.

[73] The story was told of a wise King Solomon who had 40,000 stalls of horses and wealth untold and as we leave this subject of horses, race horses and horse racing we recalled what the wise King said that wealth gained hastily will dwindle, but whoever gathers little by little will increase it.